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Criminal Law Arrest

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issue. However, in holding that a clarification would be inappropriate, because of a due regard for the federal—state system, Pennsylvania seems inconsistent with other national and state attempts to maintain the integrity of local jurisdiction.

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CRIMINAL LAW ARREST—A police officer may stop and question a person, short of arrest, if the officer has reasonable suspicion, as distinguished from probable cause to believe, that the person has committed a crime; and may make a brief frisk of the person for dangerous weapons if the officer reasonably believes that his personal safety so requires.

Commonwealth v. Hicks, 209 Pa. Super. 1, 223 A.2d 873 (1966).

After receiving a radio report of a burglary, a police officer stopped the defendant, who was walking several blocks from the burglarized apartment building. Tenants in the building had reported to police that the intruder had been a Negro "with a brown coat and a mustache."[1] Defendant, a Negro, was wearing a light-colored coat and needed a shave.[2] Incident to the stop the officer "frisked" defendant and found a three-inch penknife. Defendant was *then* arrested,[3] and was subsequently booked on the burglary charge.[4] The knife was introduced as evidence, over objection, at the trial.

The Superior Court ruled that there is nothing unconstitutional in the brief detention of citizens under circumstances not justifying an arrest where such is done for the purpose of limited inquiry in the course of police investigation. Furthermore, a policeman may "frisk"[5] the person stopped if he believes himself to be in danger from a concealed deadly weapon. Dangerous weapons discovered by such activity are admissible in evidence, although such discovery was not incidental to an "arrest."[6]

1. Commonwealth v. Hicks, 209 Pa. Super. 1, 3, 223 A.2d 873, 875 (1966).

2. Such was the testimony of the police officer who apprehended the defendant.

3. There are two common definitions of arrest. The Pennsylvania Superior Court apparently adopts the view that an arrest does not take place until a person is taken into custody "so that he may be forthcoming to answer for the commission of a crime." The other view is that "any deprivation or restraint of a person's liberty is an arrest whether or not it culminates in the charging of a crime." 100 U. PA. L. REV. 1182, 1186 (1952).

4. Finding the knife gave the policeman cause to arrest defendant at least for the offense of carrying a concealed weapon. This circumstance, added to the fact that the defendant approximately fit the description given in the police broadcast, may be said to have established the requisite probable cause to arrest defendant for the burglary. After being taken into custody the defendant was positively identified by the tenants of the burglarized apartment building.

5. "Frisking is passing the hands over the outer clothing of a person to make sure that he has no dangerous weapons concealed on his body." Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 324 (1942).

6. Note 3, *supra*.

Although Pennsylvania has no statutory law authorizing police to stop, detain, and frisk without first arresting the suspect,[7] this procedure has been upheld in other jurisdictions by case decision.[8] The adopted rationale has been that the Fourth Amendment[9] merely bans unreasonable searches—not all searches. What is reasonable, therefore, involves a balancing of interests between the security of public order by the solution and prevention of crime, and a person's immunity from police invasions into his privacy.

In discussing the right to frisk suspicious persons, one is necessarily assuming the policeman's right to "stop" such person for the purpose of inquiry. In support of the proposition that a policeman does have the right to make a reasonable inquiry of suspicious persons in public places, one may refer to a recent statement by the Pennsylvania Supreme Court:

> When a policeman is investigating a crime or supposed crime it is his duty to note everything, listen to every voice, and study every object which may enter into a reconstruction of the untoward event, whose unknown origin he is seeking to ascertain. Trial courts should not impede officers in the fulfillment of their sworn duties. To so impede them is to imperil the safety of society. A person who has already killed, robbed, or burglarized, may repeat his violence. Thus, it is imperative that the policeman question all persons in the immediate territorial and chronological area of committed violence in order to take whatever precautions may be necessary to prevent a repetition of violence.[10]

The United States Supreme Court pointed out in *Miranda v. Arizona*[11] that its decision:

> . . . "[was] not intended to hamper the traditional function of police officers in investigating crime. . . . Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding."[12]

The court in *Commonwealth v. Hicks*[13] considered the right of the

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7. See, *e.g.*, N.Y. CODE CRIM. PROC. § 180-a.

8. See State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966); United States v. Thomas, 250 F. Supp. 771 (1966).

9. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

10. Commonwealth v. Eperjesi, 423 Pa. 455, 462, 224 A.2d 216, 220 (1966).

11. 384 U.S. 436 (1966).

12. *Id.* at 477.

13. 209 Pa. Super. 1, 223 A.2d 873 (1966).

police to stop, question, and even detain persons pursuant to the investigation of a crime, short arrest or probable cause to arrest, as being a "well-recognized necessity."[14]

It is submitted that the police have the right to question a person whose actions in public arouse their *reasonable suspicion.* "It does not unreasonably invade the individual's right to privacy to hold that the price of indulgence in suspicious behavior is a police inquiry."[15] If such questioning fails to reveal probable cause for arrest, it will forestall invalid "arrests" of innocent persons on inadequate grounds.[16] If such inquiry does reveal the necessary probable cause, ". . . it would do no more than open the way to a valid arrest."[17] Chief Justice Traynor, of the California Supreme Court, would uphold the authority of officers not only to question, but also to make a subsequent arrest on the basis of probable cause that developed in the course of the questioning:[18]

> It would seem highly unrealistic to hold such an arrest invalid on the ground that the arrest actually coincided with the initial police questioning and that the then suspicious circumstances fell short of probable cause for arrest. Such technicality would invite the circumvention of building up suspicious circumstances to probable cause for arrest, and the eventual consequence might be lower standards of arrest.[19]

That "reasonable suspicion" which a police officer must have before he may inquire of a person in a public place may be such as includes a reasonable apprehension of personal danger, due to some particular circumstances.[20] In such situations police officers seem unanimous in justifying a frisk of the suspect for their self-protection, and not as a "fishing expedition" for evidence.[21] In the landmark case of *People v. Rivera*,[22] the court, after recognizing the authority of a policeman to make inquiry of a person about suspicious events, took notice of the hazards involved in this kind of public duty: "We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger. We ought

14. Commonwealth v. Hicks, 209 Pa. Super. 1, 5, 223 A.2d 873, 875 (1966).

15. State v. Terry, 5 Ohio App. 2d 122, 128, 214 N.E.2d 114, 118 (1966).

16. *Ibid.*

17. *Ibid.*

18. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 334.

19. *Ibid.*

20. See Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUPREME COURT REV. 46, 63, wherein the author suggests balancing the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security and property rights of the individual involved.

21. Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182 (1952).

22. 14 N.Y.2d 441, 201 N.E.2d 32 (1964), *cert. denied*, 379 U.S. 978 (1965).

not, in deciding what is reasonable, close our eyes to the actualities of street dangers in performing this kind of public duty."[23] According to one author,[24] a police officer runs the risk of being assaulted every time he stops someone—and often, such assaults as do materialize are of a serious nature. Considering this self-preservation motive it would seem that the only alternative to the frisk would be for the police, upon approaching a suspect whom they believe might be armed, to draw their guns and warn the suspect not to make any sudden moves—a practice pragmatically much more objectionable.

By its decision in *Commonwealth v. Hicks* the Pennsylvania Superior Court has placed Pennsylvania among the ranks of those states which recognize that a "stop and frisk," under special circumstances, may be regarded as a reasonable search. The frisk should be strictly limited to a patting down of a suspect's clothing for the sole purpose of detecting dangerous weapons. The police officer must reasonably believe himself to be in danger. The courts will check police abuses of this practice by making inadmissible any evidence obtained by a frisk that was not reasonably warranted.[25] As for the admissibility of evidence other than weapons that might be discovered under the pretext of a frisk, the following opinion is suggested:

> If a frisk reveals a weapon, which is the only purpose for which it is authorized, then it should be confiscated and be evidence against the accused on a charge of unlawfully possessing or concealing a weapon or in any other criminal context in which the possession of a weapon is a factor. If we go beyond that, then frisking a suspect . . . will become a pretext for a general search of the person, without probable cause, which the fourteenth amendment was designed to prevent. The power to frisk is an exception to the probable cause rule in search and seizure, and is not a search at all except for the discovery of a dangerous weapon concealed upon the person. There it should end, for all purposes.[26]

The "reasonable suspicion" upheld in *Commwealth v. Hicks* stemmed from events arising subsequent to the commission of a felony. The possible ramifications of the decision need not be limited by this fact, however, because the court also indicated that they recognized the right of the police to stop and question persons pursuant to the investigation of

23. *Id.* at 446.

24. Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 CALIF. L. REV. 421, 429 (1962).

25. See the safeguards contained in the New York "stop and frisk" legislation: N.Y. CODE CRIM. PROC. § 180-a.

26. People v. Sibron, 18 N.Y. 2d 603, 219 N.E.2d 196 (1966) (dissenting opinion of Judge VanVoorhis).

a crime which was "about to be committed."[27] This further suggests the awareness that a modernization of arrest privileges is needed to make them consistent with the conditions under which the police today must protect the public.

Thomas P. Ruane

EVIDENCE—Wiretapping—Extension Telephones—The Supreme Court of Pennsylvania has outlined the prohibitive reach of the wiretap statute as encompassing mechanical invasions over telephone extensions and listening on an extension without the consent of the communicating parties.

Commonwealth v. Murray, 423 Pa. 37, 223 A.2d 102 (1966).

The defendant, an employee of Summit Industries, contacted an old acquaintance and employee of a competitive firm, Lanston Company, and offered him a sum of money in exchange for confidential company information. This solicitation was reported to the Lanston officials and an effort was made to secure evidence in order to prosecute the defendant under the Penal Code of 1939[1] for offering to bribe or bribing a corporate employee. Private detectives were hired and they instructed the Lanston employee to telephone the defendant and make further arrangements for the transfer of the information while they listened on an extension phone and recorded the conversation with a mechanical device attached to the extension.[2]

Using the evidence that the detectives secured by listening on the extension phone the trial court convicted the defendant[3] despite defense's protestations that what was overheard was inadmissable under the Act of July 16, 1957, P.L. 956 section 1 which makes it a crime to "intercept a communication by telephone or telegraph without permission of the parties to such communication."[4] The Superior Court affirmed the con-

27. Commonwealth v. Hicks, 209 Pa. Super. 1, 5, 223 A.2d 873, 875 (1966).

1. The statute provides in pertinent part: "Whoever offers or gives to any agent, employee, or servant of another . . . any commission, money, property or other valuable thing, without the knowledge and consent of the principal employer, or master as an inducement, bribe, . . . is guilty of a misdemeanor. . . ." PA. STAT. ANN. tit. 18, § 667 (1963).

2. The detectives took the contacted employee to their office and attached the device to their switchboard to record the conversation and simultaneously listened in while the employee phoned the call.

3. It should be noted that the evidence obtained by use of the mechanical recording was excluded under the Pennsylvania "wiretap" statute and specifically distinguished from evidence secured by listening over the extension.

4. The statute provides in pertinent part: "No person shall intercept a communication by telephone or telegraph without permission of the parties to such communication. No person shall install or employ any device for overhearing or recording communications pass-